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ON APPEAL FROM THE [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
STATES OF [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 70

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The specially constituted district court entered its findings of fact, conclusions of law, and final decree (R. 150-152) without opinion. The report of the Interstate Commerce Commission (R. 15-22) appears in 31 M. C. C. 299.

JURISDICTION

The final decree of the district court was entered on March 19, 1943 (R. 152). The petition

for appeal was presented and allowed on April 15, 1943 (R. 159-166). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345); and Section 205 (h) of the Interstate Commerce Act, Part II, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)). Probable jurisdiction was noted by this Court on June 14, 1943 (R. 173).

QUESTIONS PRESENTED

The ultimate question is as to the validity of an order of the Interstate Commerce Commission denying to appellant * a certificate of public convenience and necessity under the "grandfather clause" of Section 206 (a) of Part II of the Interstate Commerce Act as a common carrier by motor vehicle.

The motor-vehicle operations involved have been carried on continuously since before June 1, 1935, the "grandfather" date, but were not conducted by the railroad itself or with its own equipment or personnel. Instead, the operations were conducted by certain motor-truck operators pursuant to written contracts with the railroad. These truckers were expressly designated as "independ-

*"Appellant" is used herein to designate the Chicago and Northwestern Railway Company rather than the trustee thereof.

dent contractors" in the contracts, and they served other shippers besides the railroad.

The precise question for decision, therefore, is whether the Commission was correct in holding that, under the terms of the contracts between the railroad and the motor-vehicle operators, the railroad had not conducted operations entitling it to a certificate as a common carrier by motor vehicle. Subordinate questions are whether the Commission's order was supported by substantial evidence and adequate findings and whether the Commission was required to consider issues of public convenience and necessity in these "grandfather" clause proceedings.

STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 58-63.

STATEMENT

By application¹ filed with the Commission on February 11, 1936, appellant sought a certificate of public convenience and necessity under the

¹ This application was considered by the Commission in the same report with several other applications by appellant for certificates of public convenience and necessity covering either operations instituted since June 1, 1935, or else not yet instituted. In these applications, reliance consequently could not be made upon the "grandfather" clause. These other applications were allowed (and are thus not here involved) on condition that if the railroad performed the op-

so-called "grandfather" clause of Section 206 (a) of the Interstate Commerce Act, authorizing operations as a common carrier by motor vehicle of general commodities between a number of its railway stations in Illinois, Iowa, Nebraska, Wisconsin, Michigan and South Dakota over specified routes (R. 60, 148-149).

This application involved motor-vehicle service which, since before June 1, 1935 (the statutory "grandfather" date), had been used by the railroad as a supplement to its rail service (R. 17, 62, 80). Such service is performed exclusively between various stations on the railroad's lines with respect to traffic obtained by it, and under its bills of lading and tariffs (R. 17-18, 64, 78, 81, 83). These tariffs provide that the railroad may, at its option substitute motor-vehicle service for rail service between certain stations on its lines and that the shipper shall pay the same charges therefor as would be applicable for all-rail service (R. 63, 76).

In so substituting motor-vehicle service for rail service, the railroad does not itself conduct motor-

operations by means of the equipment of others, such operations must be performed under its direction, control, and responsibility to the shippers and general public. While these applications were heard separately from the present application, all the applications were consolidated for decision. One of the motor truckers who contracted with appellant appeared as a protestant in the "grandfather" proceedings and asked that appellant's application be denied (R. 134).

vehicle operations with its own equipment or personnel (R. 98). Rather, such service is furnished pursuant to written contracts between the railroad and motor-vehicle operators, who are expressly described in the contracts as being "independent contractors," and who serve other shippers besides the railroad (R. 98, 100, 105, 107, 111, 119, 125, 130). These contractors have themselves filed applications claiming "grandfather" rights with respect to these operations (R. 97, 103, 107, 111, 125).

The contracts (of which Exhibit No. 3 attached to the complaint, R. 25-29, is typical) contain numerous provisions apparently intended to insulate the railroad against all responsibility or liability arising out of the conduct of the motor-vehicle operations.

Thus, the contracts provide that the independent contractor shall employ and direct all persons operating the motor vehicles, and "such persons shall be and remain the sole employes of and subject to control and direction of the Contractor and not the employes of the Railway Company, it being the intention of the parties hereto that the Contractor shall be and remain an independent Contractor and that nothing herein contained shall be construed as inconsistent with that status" (R. 26, 120). Under the same provision of the contracts, "The Contractor promises and agrees to conduct the work in the name of the Contractor

and agrees not to display the name of the Railway Company upon or about any of the Contractor's vehicles" (R. 26).

It is also provided that "In the event said freight shall be transported by the Contractor at such times as said stations or any of them shall be closed, the Railway Company will furnish one of its employees who shall accompany the Contractor's truck for the purpose of opening and closing stations and assisting in the unloading or loading of freight, and for this service the Contractor shall pay to the Railway Company monthly the sum of One Hundred Five Dollars (\$105.00)" (R. 26-27). With certain exceptions, "the expense of unloading and loading shall be borne solely by the Contractor" (R. 26).

The contracts require the independent contractor to comply with state, federal, and municipal laws, and to indemnify and save harmless the railroad from any failure or default in this behalf. The independent contractor is to be responsible to the railroad for loss, damage, or delay to freight entrusted to it. The independent contractor must indemnify and save harmless the railroad from all liability and claims of every kind on account of loss, damage, or delay to all property whatsoever "entrusted to the Contractor," or on account of loss or damage to "property not being transported by the Contractor." The same provision applies with respect to liability for

"injury to or death of all persons whomsoever arising out of or in connection with the performance of this agreement by the Contractor, its agents or employes." (R. 27.) The independent contractor is likewise required to indemnify the railroad and save it harmless from any claims or liabilities on account of damages for "injuries to or death of the Contractor, or any employe of the Contractor" (R. 27-28). The contract also authorizes the railroad to maintain insurance for its protection at the expense of the independent contractor, up to the amount of 1.6 percent of the compensation earned under the contract (R. 28).

The railroad agrees to pay 10 cents per hundred pounds of freight. If, however, at the end of each six-month period it is found that the payments so made do not average \$25 for each day freight is transported by the independent contractor, the railroad shall pay the difference. (R. 26.)

The independent contractor agrees to provide vehicles "of such type as shall be satisfactory to the Railway Company" for the purpose of transporting freight between certain specified freight stations "in accordance with such schedules and instructions as shall be given by the Railway Company" (R. 25). It is provided that "such freight as the Railway Company may designate" shall be transported "in a manner satisfactory to the Railway Company" (R. 25-26).

With respect to these operations, the Interstate Commerce Commission made the following findings in its report (R. 17-18):

All the applications involve transportation by motor vehicle between applicant's railway stations in rendering a service which is or will be auxiliary to or supplemental of and coordinated with the railway service. Except in the case of express matter, all of the operations relate to traffic obtained by applicant, moving at applicant's rail rates, and under rail billing. Express matter will move under applicant's outstanding contract and established arrangements with the Railway Express Agency, Inc., at rates provided for in the latter's published tariffs.

No. MC-42614.—The motor-vehicle operations involved in this application were commenced prior to June 1, 1935, but at all times have been performed by others, hereinafter referred to as the contractors, under contract with applicant. Applicant does not operate motor vehicles either as owner or under lease or any other equivalent arrangement. On the whole, the contractors were established truckers selected by applicant to perform the service and who perform service for others than applicants and have filed applications claiming "grandfather" rights thereto.

Copies of existing contracts were submitted in evidence. They are so framed as to impose upon the contractors, and not

applicant, the obligations ordinarily assumed by common carriers by motor vehicle. They provide, among other things, that the contractor shall furnish the motor vehicles, operate them in the contractor's own name, and not display applicant's name on them; that the contractor shall employ, direct, and control the drivers; that the contractor shall assume the status of an independent contractor; that the contractor's liability for the freight while in his possession shall be that of an insurer; that the contractor shall comply with all State and Federal regulations; and that the contractor shall protect, indemnify, and save applicant harmless against any and all loss and damage by reason of the operation, and shall also authorize applicant to carry insurance protecting him against any claims whatsoever arising out of the contractor's operations and to deduct from the latter's compensation the approximate cost of such insurance. These, as well as other provisions in the contracts, establish that the motor vehicles are to be supplied by the contractors and operated under their direction and control and under their responsibility to the general public as well as to the shippers. It is clear, therefore, that the motor-vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant. See *Willett Co. of Indiana, Inc., Extension—Ill., Ind., and Ky.*

21 M. C. C. 405. It follows that the application must be denied.

It concluded (R. 21):

* * * we find that applicant has not shown that he was in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between the points and over the routes requested on June 1, 1935, and continuously since; that applicant has failed to establish that he is entitled to a certificate under the "grandfather" clause of section 206 (a) of the act; and that the application should be denied.

The Commission's report and order denying the railroad's "grandfather" application were made, by Division 5, on November 26, 1941 (R. 23). The railroad's petition for rehearing was denied by the full Commission on November 2, 1942 (R. 24). On December 30, 1942, the railroad brought suit against the United States and the Commission in the United States District Court for the Northern District of Illinois, to set aside and enjoin the Commission's order (R. 1). Final hearing was held before a specially constituted three-judge court on January 28, 1943, the certified record before the Commission being received in evidence (R. 41, 44). On March 19, 1943, the district court entered its findings of fact, conclusions of law, and final decree dismissing the complaint (R. 150-152).

SUMMARY OF ARGUMENT

I

Under the "grandfather" clause of Section 206 (a) of Part II of the Interstate Commerce Act, a certificate of "public convenience and necessity" can be awarded only to one who is a "common carrier by motor vehicle" within the meaning of that Act. Where one individual arranges with shippers to provide transportation, but engages another to provide the line-haul motor transportation with the latter's vehicles, the Commission has uniformly held that only one certificate may issue, and that the one entitled thereto as the "common carrier by motor vehicle" is the one who assumes control of, and responsibility both to shippers and the general public for, these operations. This test means that one cannot be considered a "common carrier by motor vehicle" as to operations performed for him by an independent contractor. This long standing test was consistently applied by the Commission under the Motor Carrier Act of 1935; it was ratified by Congress in the Transportation Act of 1940; it has since been applied by the Commission under the latter Act; and it has been approved by the courts, including this one, under both Acts. The decisions of this Court in *United States v. Rosenblum Truck Lines Inc.*, 315 U. S. 50, and *Lubetich v. United States*, 315 U. S. 57, neither reject the Commission's "control and responsibility" test nor establish the

offering of a complete transportation service to shippers and the general public as the essential characteristic of the "common carrier by motor vehicle", in determining which of two or more claimants is entitled to that status.

II

The Commission's conclusions that, in view of all the circumstances, under the particular contracts which appellant had with truckers, the latter assumed control of, and responsibility for, these operations, and that only the latter were thus the "common carriers by motor vehicle," are supported by substantial evidence and ample findings, and are consequently binding upon the Court. Incorrectness of the Commission's conclusions is not established by the facts that appellant, as to these operations, might be initially liable to shippers and to the public, deals directly with the public, files tariffs, and issues bills of lading. Exactly the same conditions exist with respect to "freight forwarders"; yet they have been held by this Court not to be "common carriers by motor vehicle." *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed, *per curiam*, 309 U. S. 638. Appellant would only be initially liable and under its contracts is then saved harmless by the truckers. Since the responsibility which is referred to in the Commission's test is ultimate rather than initial responsibility, it cannot be said that appellant satisfies

that test. Hence, the contractors, instead of appellant, were the "common carriers by motor vehicle" with respect to these operations, and the Commission properly held that appellant was not entitled to the single "grandfather" certificate which may be granted.

III

The Commission was not obliged, in a proceeding under the "grandfather" clause, to consider whether actual public convenience and necessity might have required the granting of a certificate to appellant. Under its right to prescribe appropriate rules of procedure, the Commission had adopted different application forms for certificates under the "grandfather" clause, and for those where actual proof of public convenience and necessity is required. It has steadfastly refused to consider the two types of applications in the same proceedings, and it has been sustained by the courts in such practice. Logic and administrative expediency dictate dealing with these widely disparate issues in separate proceedings. No hardship results to appellant from this practice. Since the denial of its "grandfather" application was based on the fact that it was not a "common carrier by motor vehicle," and since a certificate of public convenience and necessity is only required of such carriers, appellant remains free to continue doing business in the same man-

ner as at present, without the Commission's authorization. If appellant now desires to become a "common carrier by motor vehicle," it is at liberty to make proper application for a certificate on the basis of public convenience and necessity, and to have a full hearing on the separate issues raised by such an application.

ARGUMENT

I

APPELLANT IS NOT ENTITLED TO A "GRANDFATHER" CERTIFICATE WITH RESPECT TO MOTOR-VEHICLE OPERATIONS WHICH WERE NOT PERFORMED UNDER ITS CONTROL AND RESPONSIBILITY BOTH TO SHIPPERS AND THE GENERAL PUBLIC

A. THE BENEFITS OF THE "GRANDFATHER" CLAUSE APPLY ONLY TO OPERATIONS AS A "COMMON CARRIER BY MOTOR VEHICLE"

Both the general language of Section 206 (a) of the Act, wherein the "grandfather" clause appears, and the specific language of the clause itself clearly indicate that the benefits of that clause are to apply only to those engaged, with respect to any particular service, in *bona fide* operations as "common carriers by motor vehicle" within the meaning of Section 203 (a) (14) of the Act.² Thus, Section 206 (a) provides that

² Section 203 (a) (14) provides:

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign

"* * * no *common carrier by motor vehicle* subject to the provisions of this part shall engage in any interstate * * * operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations." But the "grandfather" proviso relieves applicants for these certificates from actual proof of public convenience and necessity, where "*any such carrier was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * **" [Italics supplied.] To obtain the benefits of the special privilege conferred by the "grandfather" clause, an applicant must be plainly embraced within its terms. *McDonald v. Thompson*, 305 U. S. 263, 266; *Gregg Cartage & Storage Co. v. United States*, 316 U. S. 74, 83. Consequently, appellant railroad, in order to secure a certificate under that clause, must clearly establish that it was a "common carrier by motor

commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I." (49 U. S. C. 303 (a) (14).)

vehicle," within the meaning of the Act, during the critical period and with respect to the particular operation involved.

B. WHERE ONE INDIVIDUAL ARRANGES WITH SHIPPERS TO PROVIDE TRANSPORTATION, BUT ENGAGES ANOTHER UNDER CONTRACT TO PERFORM THE LINE-HAUL MOTOR TRANSPORTATION WITH THE LATTER'S VEHICLES, ONLY THE ONE CONTROLLING AND ASSUMING RESPONSIBILITY BOTH TO SHIPPERS AND THE GENERAL PUBLIC FOR THE OPERATIONS CONDUCTED, MAY BE CONSIDERED THE "COMMON CARRIER BY MOTOR VEHICLE" ENTITLED TO A CERTIFICATE

In determining whether the railroad was operating as a "common carrier by motor vehicle" during the "grandfather" period, the Commission was faced with a familiar problem: which of two individuals should be considered the "carrier by motor vehicle" entitled to a certificate where one individual arranges with shippers to provide transportation but engages another under contract to perform the actual motor transportation with the latter's vehicles.

The Commission was first faced with this problem under the language of the original Motor Carrier Act of 1935. At that time, the definition of "common carrier by motor vehicle" in Section 203 (a) (14) read as follows (49 Stat. 543, 544):

The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease

or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

Under this language, the Commission, with respect to line-haul motor transportation, consistently took the view in a long line of cases that only one certificate could be granted on the basis of a single transportation service and that under the above circumstances, the "common carrier by motor vehicle" entitled to the certificate was the person who exercised direction and control of the motor-vehicle operations and assumed full responsibility therefor both to shippers and the general public.³ The Commission uniformly followed this rule under these circumstances whether the one dealing directly with the public was a com-

³ *Acme Fast Freight Common Carrier Application*, 8 M. C. C. 211, 218-221, 223-224, 227; *Illinois Central R. Co. Common Carrier Application*, 12 M. C. C. 485, 486-488; *Dixie Ohio Express Co., Common Carrier Application*, 17 M. C. C. 735, 738-741; *Willett Company of Indiana, Inc., Extension of Operations*, 21 M. C. C. 405, 408; *Missouri Pacific Railroad Co. Common Carrier Application*, 22 M. C. C. 321, 326-327; *J. T. O'Malley, Common Carrier Application*, 23 M. C. C. 276, 279.

mon carrier by motor vehicle⁴ or a common carrier of another type, such as a railroad⁵ or freight forwarder.⁶ The test merely means that one cannot be considered a "common carrier by motor vehicle" as to trucking operations performed for it by an independent contractor, and frequently the test has been phrased in such form.⁷

The basis for this construction is best illustrated by the following excerpt from the Commission's decision in *Acme Fast Freight Inc. Common Carrier Application*, 8 M. C. C. 211, 218-220:

The question is whether the definition of "common carrier by motor vehicle" in the act can properly be construed, in the light of the provisions and purposes of the act as a whole, to include such indirect operations. The undertaking of applicant as a common carrier, so far as these indirect operations are concerned, strictly speaking, is not to transport property but to see that

⁴ *Dixie Ohio Express Co. Common Carrier Application*, *supra*; *J. T. O'Malley Common Carrier Application*, *supra*.

⁵ *Illinois Central R. Co. Common Carrier Application*, *supra*; *Willett Company of Indiana, Inc., Extension of Operations*, *supra*; *Missouri Pacific Railroad Co. Common Carrier Application*, *supra*.

⁶ *Acme Fast Freight Common Carrier Application*, *supra*.

⁷ *Acme Fast Freight v. United States*, 30 F. Supp. 968, 972, affirmed, *per curiam*, 309 U. S. 638; *Willett Co. of Indiana, Inc., Extension*, *supra*, 408; *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697, 705.

it is transported. The words of the definition are "undertakes * * * to transport." It is true that "undertakes" is followed by the words "whether directly or by a lease or any other arrangement," but the word "lease" clearly refers to the use so commonly made of vehicles which are not owned but held under lease, and the words "any other arrangement" which significantly are conjoined with the word "lease", can and should, we believe, be interpreted to cover any similar means, compatible with an undertaking "to transport", which permit the use by the carrier of the property of others under its own domination and *control*.

* * * * *

In this connection, various provisions of the Act are significant. Section 206 (a) provides, as shown above, that no motor carrier "shall engage in any interstate or foreign operation on any public highway" without a certificate. Can it be said that a forwarding company is engaged in "operation" on a highway merely because goods in its custody are transported on that highway by an independent motor carrier? We have also noted the proviso in Section 208 (a) to the effect that no terms, conditions, or limitations in a certificate shall restrict the right of a carrier "to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate." Certainly this

conceives of a motor carrier as an agency in possession and *control* of equipment and facilities on the route or in the territory in question; rather than as an agency which is merely being served by equipment and facilities in the possession and *control* of others. [Italics supplied.]

Under the language of the 1935 Act, there was, however, one situation where motor transportation was performed under contract by one individual for another who provided for the transportation with the public, where the Commission did not apply the "control and responsibility" or independent contractor test. That was where a railroad engaged another to perform a motor collection and delivery service for it in a terminal area. The Commission had recognized long before the Motor Carrier Act of 1935 that there was a clear distinction between a motor collection and delivery service performed by or for a railroad, and the line-haul motor transportation performed by or for a railroad, which was involved in the cases heretofore considered. Thus, it had recognized that the former service, unlike the latter, was an integral part of railroad transportation subject to its jurisdiction under Part I of the Interstate Commerce Act, because it constituted the furnishing of a railroad terminal facility. When Congress brought the operations of common carriers by motor vehicle under the Commission's jurisdiction in 1935, the definition of "common carrier by motor vehicle" adopted in Section 203

(a) (14) included "motor vehicle operations of carriers by rail * * *; *except to the extent that these operations are subject to the provisions of Part I.*" [Italics supplied.] In view of these circumstances and in view of this exception in the definition of "common carrier by motor vehicle," the Commission held under the 1935 Act that one performing a motor collection and delivery service, under contract with, and as agent for, a railroad in a terminal area, was engaged, in transportation by railroad and not a "common" or "contract carrier by motor vehicle," even though such operations were carried on by the individual under his own control and as an independent contractor. *Pick-Up and Delivery in Official Territory*, 218 I. C. C. 441, 449, 470-473, affirmed *sub nom. American Trucking Ass'n v. United States*, 17 F. Supp. 655 (D. D. C.); *Scott Bros., Inc., Collection and Delivery Service*, 4 M. C. C. 551, 553-559. On the other hand, the Commission had held under the 1935 Act, much as in the line-haul motor transportation cases, that where a motor common carrier engaged another, apparently an independent contractor, to perform a motor collection and delivery service for it in a terminal area, such other was a "common carrier by motor vehicle" entitled to an independent certificate. *Dick's Transfer & Truck Term. Contract Carrier Application*, 20 M. C. C. 785.

This consistent construction of the statute in its 1935 form with respect to line-haul motor

transportation by the expert agency which administered it is, of course, entitled to great weight. *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, 549. But it was also uniformly and specifically accepted by this and other courts. The Commission's "control and responsibility" test under the statute in its 1935 form was first judicially reviewed and approved in *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968 (S. D. N. Y.), and the decision was affirmed by this Court, *per curiam*, 309 U. S. 638. It was there held that a freight forwarder, although a common carrier at common law, could not be considered a "common carrier by motor vehicle" with respect to motor operations performed for it by an independent contractor.⁸ Subsequently, in *O'Malley v. United States*, 38 F. Supp. 1 (D. Minn.), a three-judge district court sustained a

⁸ The court said (30 F. Supp. at 972) :

"It is argued that the words in Section 203 (a) (14) defining a common carrier by motor vehicle as any person who 'undertakes, whether directly or by a lease or any other arrangement, to transport * * * any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation' are broad enough to include forwarders which do not carry merchandise directly. But the words 'by a lease' refer to cases where goods are transported by vehicles not owned but held under lease, and the words 'by * * * any other arrangement,' under the rule of *eiusdem generis*, should be taken to involve some similar means whereby a carrier operates in *propria persona* or through its agents and not through independent contractors."

holding by the Commission⁹ that "an individual who arranged with the public for trucking performed by others under contract was not under the terms of the particular contract himself a "common carrier by motor vehicle." The stamp of judicial approval was there specifically placed upon the Commission's consistent ruling "that to be a carrier by motor vehicle one must have direction and control of the motor vehicles which do the carrying for him, so that he is responsible both to the shipper and the general public for their operation" (38 F. Supp. 1, 3).

It is thus obvious that the "control and responsibility" test which was applied by the Commission in the present case, was perfectly proper under the language of the 1935 Act. Appellants' contention (Br. 26-28) that this test failed to give proper recognition to the reference to "any other arrangement" in the language of the 1935 definition of "common carrier by motor vehicle" (see pp. 16-17, *supra*) must necessarily be rejected in view of the aforementioned express judicial approval which the test has received. Appellants urge too (Br. 26-28) that the application of the test disregards the reference to "motor vehicle operations of carriers by railroad" in the foregoing definition and the clear recognition in the legislative history of the 1935 Act that railroads

⁹ *J. T. O'Malley Common Carrier Application*, 23 M. C. C. 276.

were to be entitled to carry on operations as "common carriers by motor vehicle." But it is very plain that there is nothing in this test which prevents railroads from operating as "common carriers by motor vehicle," and in numerous cases the Commission has granted railroads certificates to so operate, where, on different facts from the type involved here, they satisfied the requirements of this test. *E. g., Illinois Central Railroad Co. Common Carrier Application*, 12 M. C. C. 485; *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697; 34 M. C. 599; *Crooks Terminal Warehouse Inc. Contract Carrier Application*, 34 M. C. C. 679. The Commission, in applying this test to railroad applicants, has merely placed them on a parity with non-railroad applicants. And certainly there is nothing in the Act or its history which requires more favorable treatment for applicants who are railroads than for those who are not.

The Commission's test was thus perfectly valid under the language of the 1935 Act; and the changes made in the Act by the Transportation Act of 1940 (54 Stat. 898), and the legislative history of that Act, clearly demonstrate Congressional approval and ratification of the control and responsibility test. Inasmuch as the latter Act was passed subsequent to the hearing in the present case, but prior to the Commission's decision, it

was necessary that the Commission decide the case in the light of the 1940 Act.¹⁰ *Ziffrin v. United States*, 318 U. S. 73. Appellant's contention (Br. 23) that it is unnecessary to consider these amendments must therefore be disregarded.

The Transportation Act of 1940 amended the definition of "common carrier by motor vehicle" in Section 203 (a) (14)¹¹ to read as follows (54 Stat. 920):

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transpor-

¹⁰ The hearing in this case was held on March 28, 1938, the Transportation Act of 1940 was enacted on September 18, 1940, and the case was decided by the Commission on November 26, 1941.

¹¹ Before amendment, this Section provided (49 Stat. 543, 544):

"The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly by lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I."

tation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I. (49 U. S. C. 303 (a) (14).)

It also added Section 202 (c) (2) which provides as follows (54 Stat. 920):

Notwithstanding any provision of this section or of section 203, provisions of this part shall not apply—

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, or a water carrier subject to part III, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental. (49 U. S. C. 302 (c) (2).)

This language and its legislative history establish that Congress intended to make no change in and to ratify the construction which the Commission had placed upon the definition of "common carrier by motor vehicle" in the 1935 Act, except in the limited situation where a motor

collection and delivery service was performed in a terminal area for a common carrier. In the latter situation, Congress not only intended to ratify the application of the rule enunciated in *Scott Bros. Inc., Collection and Delivery Service*, 4 M. C. C. 551 (see p. 21, *supra*), but to extend the application of that rule in order also to deny "common carrier by motor vehicle" status to individuals performing such terminal service for line-haul common carriers other than railroads.

As to the language, the use of the word, "itself," in the phrase "holds itself out to the general public to engage in transportation," emphasizes the necessity that one must personally assume control and responsibility. As to the legislative history, it appears that the original version of the Transportation Act of 1940, as reported out and passed by the Senate, while it did not substitute the phrase, "holds itself out to the general public to engage in * * * transportation," for "undertakes * * * by lease or any other arrangement, to transport * * * for the general public," in the definition of "common carrier by motor vehicle," did in such definition¹² contain language which was

¹² This definition then contained the following proviso:

"Provided, That persons acting as agents for common carriers in the performance of transfer or collection and delivery service by motor vehicle within terminal areas, shall not as to such operations be deemed common carriers by motor vehicle but each such operation shall be deemed to be that of the carrier for which it is performed" (84 Cong. Rec. 5963).

comparable to that now found in Section 202 (c) (2). That such language was aimed at clarifying the situation dealt with by the Commission in the *Scott Bros.* case is evident from the following excerpts from the Senate Committee report on the bill (S. Rep. 433, 76th Cong. 1st sess., p. 8):

Under the Motor Carrier Act there has been extensive litigation as to the status of operators conducting transfer or collection and delivery service by motor vehicle for common carriers within terminal areas. In this bill, persons conducting such operations are specifically excluded, as to these operations, from those embraced within the terms of the definition of a common carrier.

The bill as originally reported out and passed by the House contained in a single Section language substantially like that now found in the separate Sections 202 (c) (2) and 203 (a) (14), including the phrase "holds itself out to the general public to engage in * * * transportation" in place of "undertakes by lease or any other arrangement

¹⁰ In H. Rep. 1217, 76th Cong., 1st sess., p. 16, it was said with respect to the amended definition of common carrier:

"Under the present definitions transportation of passengers or property by a lease or any other arrangement is included. This language is omitted from the definition as rewritten. Its application is not clear. Presumably, it was intended to cover the case of a person who, though not performing service as a carrier, leased vehicles to another person to be used by such other person for his own purposes. Careful consideration was given to this question, but the committee decided that it was best to leave this or any similar language out of the definitions."

to transport * * * for the general public."¹⁴

At this stage, the Chairman of the Legislative Committee of the Interstate Commerce Commission on January 29, 1940, recommended to Congress as follows:¹⁵

Desirable—(a) In view of controversies which have arisen and have not as yet been finally determined in court with respect to the meaning of the words "undertakes whether by lease or any other arrangement," especially with reference to forwarding companies,¹⁶ we believe that the wording in this respect of the House bill is preferable. We therefore suggest that the following be substituted * * *: "means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof."

The House version was then accepted in conference, except that it was for convenience divided into the two present Sections.¹⁷ In the ensuing debates in the Senate on the conference report, Senator Truman, a member of the Senate Com-

¹⁴ 84 Cong. Rec. 9953-9954.

¹⁵ Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess., p. 45.

¹⁶ The Commission clearly had reference to the *Long East Freight* case (see p. 22, *supra*).

¹⁷ H. Rep. 2016, 76th Cong., 3d sess., pp. 19-20; H. Rep. 2832, 76th Cong., 3d sess., p. 74.

mittee on Interstate Commerce and one of the sponsors of the bill, made the following illuminating statement (86 Cong. Rec. 11546):

Section 203, paragraphs (14) and (15), have been rewritten for the sole purpose of eliminating carriers performing pick-up, delivery, and transfer service. This change was suggested by the Chairman of the Interstate Commerce Commission.

The conferees wish to make it plain that it is not their intention, by changing the language of paragraphs (14) and (15) of section 203 to change the legislative intent of the Congress one iota with respect to definition of common and contract carriers other than those performing pick-up, delivery, and transfer service.

The Commission has subsequently recognized, where a terminal collection and delivery service was involved, that the effect of the foregoing 1940 amendments was to authorize the application of the rule in the *Scott Bros. case* (see p. 21, *supra*), to situations where such service was performed for line-haul carriers other than railroads.¹⁸ On the other hand, it has since specifically held that, where line-haul motor transportation was involved, the changed language in the 1940 Act did not warrant a different construction of "common car-

¹⁸ *Mayhew Common Carrier Application*, 27 M. C. C. 205, 206; *Dieckbrader Contract Carrier Application*, 28 M. C. C. 703, 708; *Hansen Contract Carrier Application*, 28 M. C. C. 483; *Bleich Common Carrier Application*, 27 M. C. C. 9, 13.

rier by motor vehicle" from that which had been adopted under the 1935 Act.¹⁹ Accordingly, it has consistently since applied the same "control and responsibility" or independent contractor test with respect to line-haul motor transportation, which it had applied under the earlier Act.²⁰ Furthermore, a three-judge court has under the language of the 1940 Act approved the application of this test by the Commission, and that decision has been affirmed *per curiam* by this Court. *Moore v. United States*, 41 F. Supp. 786 (D. Minn.), affirmed, *per curiam*, 316 U. S. 642.

Appellant asserts (Br. 47-53, 57) that the Commission's subsequent decisions in *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697, 34 M. C. C. 599, and *Crooks Terminal Warehouse Inc. Contract Carrier Application*, 34 M. C. C. 679, granting railroads "grandfather" certificates, cannot be reconciled with the present decision denying it such a certificate. But examination of those cases reveals that the Commission applied the same legal test as it did here but

¹⁹ *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697, 705; 34 M. C. C. 599, 608.

²⁰ *Mayhew Common Carrier Application*, 27 M. C. C. 205, 206-207; *Ernest E. Moore Common Carrier Application*, 28 M. C. C. 187; *Crooks Terminal Warehouse, Inc., Contract Carrier Application*, 34 M. C. C. 679; *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697, 705, 34 M. C. C. 599, 610, and an unreported decision of August 27, 1943, in the same case, printed as an appendix to appellant's brief (Br. 84).

reached a different conclusion on facts different from those here.²¹ Any inconsistency between these cases is purely an inconsistency in factual findings with which this Court will not concern itself. *Virginian Ry. v. United States*, 272 U. S. 658, 665; *Western Chemical Co. v. United States*, 271 U. S. 268. Moreover, the Commissioner's Decision in the *Boston & Maine* case is being challenged in a pending case.²²

It is contended (Br. 23-25) that this Court's decision in *United States v. Rosenblum Track Lines, Inc.*, 315 U. S. 50, has in effect rejected the Commission's "control and responsibility" test and has determined that instead the one who offers the complete transportation service to the general public and the shipper in this type of case must be considered the "common-carrier by motor vehicle." While appellant's brief does not mention

²¹ Though it disagreed with the Commission's conclusion, the concurring opinion of Commissioner Eastman in the present case did not question the propriety of the legal test employed. Mr. Eastman stated that he disagreed because of the reasons set forth in his concurring opinion in *Missouri Pacific R. Co. Common Carrier Application*, 22 M. C. C. 321, 331-336. His concurring opinion in the earlier case did not challenge the validity of the legal test applied, but only the factual conclusions reached in applying that test. And a report and order of the Commission from which some of the members dissent has of course the same legal validity as if supported by all. *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349, 362.

²² *Auclair v. United States* (D. Mass., Civil No. 2247, complaint filed March 20, 1943).

this Court's decision in a companion case, *Lubetich v. United States*, 315 U. S. 57, presumably reliance in this connection is also placed upon that decision. We submit, however, that these decisions rendered in the interval between this Court's decision in the *Acme* and *Moore* cases (see pp. 22, 31, *supra*) are open to no such construction.

In the *Rosenblum* and *Lubetich* cases, decisions of the Commission were sustained which, applying the "control and responsibility" test, held that certain so-called "owner-operators" performing trucking exclusively for motor common carriers were not entitled to "grandfather" certificates or permits either as "common" or "contract carriers by motor vehicle." The Court, it is true, found it unnecessary there to consider whether the Commission's findings as to the "owner-operators'" lack of control and responsibility were supported by substantial evidence. 315 U. S. 50, 53. But this was merely because the Commission had in its reports made the finding, not challenged in this Court,²⁴ that the companies for which these

²⁴ *N. E. Rosenblum Truck Lines Inc. Contract Carrier Application*, 24 M. C. C. 121; *Pete Lubetich Common Carrier Application*, 24 M. C. C. 141, 147-148.

²⁵ In the *Rosenblum* case, the appellee did not in this Court contend that it was other than a contract carrier (315 U. S. at 56) or dispute the Commission's finding that those for whom it hauled were "common carriers by motor vehicle." In the *Lubetich* case, the opinion pointed out (315 U. S. at 60) that the Commission's finding that the company for which ap-

"owner-operators" hauled were themselves motor "common carriers." Since the Court held that Congress intended only one "grandfather" right to accrue with respect to a single transportation service, and that to accrue to "the common carrier by motor vehicle," it followed that the "owner-operators" could not successfully lay claim to such rights. There is nothing to indicate that the Court intended to reject the "control and responsibility" test where, as here, it would serve to determine which of two or more claimants was the "common carrier by motor vehicle." Nor is there anything to indicate that the Court, in holding that those particular "owner-operators" were not entitled to "grandfather" rights, meant that everyone offering a complete transportation service to the public, which was performed by another, was himself necessarily a "common carrier by motor vehicle," notwithstanding entirely different findings as to control and responsibility by the Commission.²⁵ To derive any such converse teaching from

pellant hauled was a "common carrier by motor vehicle" could not be challenged, since the evidence upon which the finding was made was not included in the record before this Court. See *Mississippi Valley Barge Co. v. United States*, 292 U.S. 282, 286.

²⁵ While in some respects the status of the "owner-operators" in the *Rosenblum* and *Lubetich* cases, was comparable to that of the truckers with which appellant has contracts, there are significant differences. For example, there the claimants hauled only for common carriers and primarily for a single one, whereas here the companies serving appellant also serve other shippers. In the *Rosenblum* case, it appeared

these cases is to disregard the actual facts there before the Court and to render the decisions utterly inconsistent with the Court's decisions before and since, in the *Acme* and *Moore* cases (see pp. 22, 31, *supra*). Though the Court did say that it was the common carrier there who "offered the complete transportation service to the general public and the shipper" (315 U. S. at 54), it seems clear that the Court was merely describing the particular facts rather than setting up the quoted language as some new and essential criterion for ascertaining the "common carrier by motor vehicle." Not only did the Court elsewhere in the *Rosenblum* case (315 U. S. at 56) specifically recognize that "carriers within the meaning of the Act need not deal directly with the public" (as in the case of dealings through brokers), but in the *Acme* and *Moore* cases claimants were held not to be "carriers by motor vehicle" even though they did offer the complete transportation service to the shippers.

that in only "some instances" was the cost of insurance for the public and shippers charged to the "owner-operator" and only "on occasions" were shipper damage claims charged to him. In the *Lubetich* case, while the "owner-operator" generally bore the ultimate cost of shipper claims, there was no finding that he bore the cost of insurance for the benefit of the general public. Also, in the *Rosenblum* case, the common carrier required the drivers to "sign in" at various registration points to be acceptable to it, and it did not appear from the record whether or not the carrier refused to let his name appear on the trucks. 24 M. C. C. 121, 122-123; 24 M. C. C. 141, 147-150. Cf. Statement, *supra*, pp. 4-7.

II

THE COMMISSION'S CONCLUSION THAT APPELLANT DID NOT ASSUME CONTROL OF AND RESPONSIBILITY FOR THESE MOTOR OPERATIONS IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND ADEQUATE FINDINGS AND MUST THEREFORE BE SUSTAINED

The Commission concluded, in the nature of an ultimate finding of fact, that the contractors, and not the railroad, assumed direction and control of these motor-vehicle operations and responsibility for them both to shippers and to the general public. Applying its "control and responsibility" test, it held that these operations were not conducted by the railroad as a "common carrier by motor vehicle" and that the railroad was thus not entitled to a certificate covering them (R. 18). There is in the provisions of the contracts, introduced before the Commission, and in the evidence as to surrounding circumstances, substantial evidence to support the Commission's conclusions as to control and responsibility.

So far as control is concerned, the fact that each contract recited that "the Contractor shall be and remain an independent Contractor and nothing herein contained shall be construed as inconsistent with that status" (R. 26) is practically conclusive proof that the contractors rather than the railroad had control of these operations. The essential distinguishing characteristic of the independent contractor has always

been considered by the courts to be the fact that he retains the supervision and control as to the manner in which the work is to be done.²⁶ Furthermore, as has been suggested, the very test of control and responsibility employed by the Commission in the present type of case has been treated as virtually synonymous with the proposition that one could not be considered a carrier as to operations conducted for him by an independent contractor. *Acme East Freight, Inc. v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed, *per curiam*, 309 U. S. 638; see also *Moore v. United States*, 41 F. Supp. 786 (D. Minn.), affirmed, *per curiam*, 316 U. S. 642; *O'Malley v. United States*, 38 F. Supp. 1 (D. Minn.).

Other provisions of the contracts corroborate the expressed intention of the parties that the motor-vehicle operators were to be independent contractors and have direction and control of these operations. Thus, it is provided that the con-

²⁶ *New Orleans M. & R. Co. v. Hanning*, 15 Wall. 649, 657; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 523; *Casement v. Brown*, 148 U. S. 615, 622; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 221; *Chicago, R. I. & P. Ry. v. Bond*, 240 U. S. 449, 456; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 521. See Clerk and Lindsell, *Torts* (9th ed. 1937), pp. 90, 91; Bohlen, *Fifty Years of Torts* (1937), 50 Harv. L. Rev. 1225, 1231, 1232; Steffen, *Independent Contractor and the Goods-Life* (1935), 2 U. of Ch. L. Rev. 501; Douglas, *Vicarious Liability* (1929), 38 Yale L. J. 584, 601; Holmes, *Agency* (1891), 5 Harv. L. Rev. 1, 15; Note (1941), 26 Ia. L. Rev. 419.

tractor shall employ and direct all persons operating the motor vehicles, and "such persons shall be and remain the sole employes of and subject to control and direction of the Contractor and not the employes of the Railway Company." It is also agreed that the contractor shall conduct the work in his own name, and not "display the name of the Railway Company" upon or about any of the Contractor's vehicles." (R. 26.) The contractors are required to comply with state, federal and municipal laws (R. 27). Finally, it is significant in this connection that, as the Commission found, on the whole these contractors haul for shippers generally and not merely for the railroad (R. 18, 107, 130). Furthermore, this last finding, contrary to appellant's contentions (Br. 65), is definitely supported by evidence of record.²⁸

Likewise, the unequivocal contract provisions evince a studied effort by the railroad to avoid for

²⁷ The prohibition against using the railroad's name on the vehicles was doubtless due to the evidentiary value of such use in case of a lawsuit based upon negligent operation. *East St. Louis Connecting Ry. Co. v. Altgen*, 210 Ill. 213, 215; *Hartig v. American Ice Co.*, 290 Pa. 21, 29; 3 Wignore, *Evidence* (3rd ed. 1940), sec. 2510 (a).

²⁸ The following testimony on cross-examination of appellant's witness W. W. Starr is pertinent (R. 98):

"Q. Do you know whether or not the various contractors handled any other freight other than the freight of your company at the same time?"

"A. I know of some cases where they have, yes, sir.

"Q. That was quite general, is that right?"

"A. Yes, sir."

itself and to place upon the contractors all ultimate responsibility whatsoever, both to shippers and the general public, for the conduct of these motor-vehicle operations. The contracts provide that the contractors shall save the railroad harmless from all liability and claims connected with these operations and arising from: loss or damage to property entrusted to the contractors or to property not being transported by them; death or personal injury to employees and agents of the contractors or to any third persons; and failure of the contractors to comply with state, federal and municipal laws (R. 27-28). Furthermore, it is provided that the contractors shall assume the liability of an insurer as to freight in their possession, and, as previously stated, that the railroad's name will not be displayed on the trucks employed (R. 26). In addition, the railroad is authorized to maintain insurance for its own protection against any type of claim arising from these operations and to deduct the cost thereof from the contractors' compensation (R. 28-29).

Appellant, nevertheless, asserts (Br. 44) that certain provisions of these contracts indicate that it did assume direction and control of these operations. It points to the fact that the contracts provide that the vehicles shall be "of such type as shall be satisfactory to the Railway Company" and that "such freight as the Railway Company may designate" shall be transported "in accord-

ance with such schedules and instructions as shall be given by the Railway Company," and "in a manner satisfactory to the Railway Company." However, these provisions are only such as any large shipper might appropriately incorporate in a contract with a motor carrier, and not such as to give appellant the degree of control required to make it the "common carrier by motor vehicle" under the above test. These provisions grant appellant control merely over the results rather than over the method of doing the work (R. 120). Consequently, under traditional concepts they are not inconsistent with the conclusion that the truckers here are independent contractors (*Casement v. Brown*, 148 U. S. 615, 622; see also the authorities cited in fn. 26, p. 37, *supra*) and thus the "common carriers by motor vehicle."

Appellant urges (Br. 40-43) that still other factors establish the incorrectness of the Commission's conclusions. It is pointed out that appellant, as an originating rail carrier, would be initially liable to shippers²⁹ and perhaps to third persons for any damages arising out of these motor operations, and that it deals directly with the public, files tariffs covering these operations,

²⁹ Under the rule of such cases as *Missouri Pacific Railroad Co. v. Reynolds Davis Grocery Co.*, 268 U. S. 366, and *San Insurance Office v. Be-Mac Transport Co.*, 132 F. (2d) 535 (C. C. A. 8), an initial carrier is liable in the first instance to shippers for damage done to freight while in the hands of a connecting carrier acting as its agent.

and issues the bills of lading. It is submitted, however, that the Commission, despite these factors, was justified in concluding that the railroad did not control and assume responsibility for these operations and was not the "common carrier by motor vehicle."

The fact that appellant might be initially liable to shippers and third parties does not satisfy the Commission's "control and responsibility" test so as to make it a "common carrier by motor vehicle" where, as here, the ultimate liability is shifted by contract to the trucker. Similar initial responsibility to shippers is undertaken by "freight forwarders"; yet freight forwarders have been held not to enjoy the status of a "common carrier by motor vehicle" under the "grandfather" clause. *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed, *per curiam*, 309 U. S. 638. Speaking for the statutory three-judge court, Judge Augustus Hand said:

While the four forwarding companies are doubtless responsible to their customers as common carriers at common law we think it clear that none of them is "a common carrier by motor vehicle" within the meaning of the Motor Carrier Act and that the certificate of public convenience and necessity was rightly denied. (30 F. Supp. at 973.)

The "control and responsibility" test applied by the Commission and approved by the courts

in the *Acme*, *Moore*, and *O'Malley* cases (see pp. 22-23, 31, *supra*), has been developed for determining which of two or more individuals participating in particular motor carrier transportation is to be considered the "common carrier by motor vehicle." The test applied by the Commission and approved by the courts in these cases was clearly concerned not with the initial liability, to shippers and the public, but rather with the ultimate responsibility as the parties had sought to fix it between each other.³⁰ Consequently, in appraising the relationship *inter se* of the railroad and the motor-truck operators actually hauling its freight. It is of no significance that the shipper might hold the railroad liable as a common carrier by rail. Such initial liability, like that of a surety, does not settle the question of ultimate responsibility. If appellant, by contract with the truckers, placed upon them, and did not itself assume, the ultimate responsibility for the motor-vehicle operations, the Commission under the above test was unquestionably correct in denying its application for a certificate under the "grandfather clause" as a "common carrier by motor vehicle."

³⁰ *Acme Fast Freight, Inc. Common Carrier Application*, 8 M. C. C. 211, 221; *J. T. O'Malley Common Carrier Application*, 23 M. C. C. 276, 278; *Moore Common Carrier Application*, 28 M. C. C. 187, 191. The courts likewise have frequently commented upon the assignment of liability between the two parties as a pertinent factor in determining whether or not one was an independent contractor. See, e. g., *Chicago, R. I. & P. Ry. v. Bond*, 240 U. S. 449, 456.

The *Acme* case also clearly establishes that all the other allegedly distinguishing characteristics in the present case do not make appellant a "common carrier by motor vehicle" under the "control and responsibility" test. For *Acme*, like appellant, though carrying on motor operations through independent contractors, with respect to such operations still handled all dealings with the public, filed tariffs, and issued bills of lading.³¹ It is thus evident that in all material respects, appellant's role is like that of the freight forwarders in the *Acme* case. Like them, it deals with shippers as a carrier, but then in turn in the role of shipper entrusts the freight to truckers who are themselves "common carriers by motor vehicle." And, as was pointed out *supra*, pp. 32-35, the subsequent *Rosenblum* decision cannot be said to have qualified the *Acme* decision nor to have established the direct offering to the public of a complete transportation service as the essential characteristic of the "common carrier by motor vehicle."

³¹ *Acme Fast Freight Common Carrier Application*, 2 M. C. C. 415, 418-419; 8 M. C. C. 211, 215. See also the Commission's decision in *O'Malley Common Carrier Application*, 23 M. C. C. 276, 277-278, and *Moore Common Carrier Application*, 28 M. C. C. 187, 189, sustained by the courts in the *O'Malley* and *Moore* cases (*supra*, pp. 22-23, 31), which indicate that most of the dealings with the public in those cases were also by the unsuccessful applicant and that, in the latter case, freight was handled on the applicant's bill of lading.

Appellant asserts (Br. 65-66) that the Commission's statement (R. 18) that, on the whole, the truckers had themselves filed "grandfather" applications claiming rights with respect to these operations is not supported by evidence of record. While there plainly was in the record substantial evidence to support this statement,³² we think that whether or not the truckers had filed applications is quite immaterial here. Appellant in any event cannot establish its "grandfather" rights by proof of disclaimer of such rights by others.

Since there is substantial evidence and a rational basis to support the Commission's determination that appellant had no control of, and responsibility for, these operations, its determination is binding upon this Court. *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546; *Gray v. Powell*, 314 U. S. 402, 411-412; *United States v. Maher*, 307 U. S. 148, 153-154; *Rochester Telephone Corp. v. United States*, 307 U. S. 125.

³² Appellant's witness Starr testified on cross-examination as follows (R. 97) :

"Q. Mr. Starr, are you generally acquainted with the various contractors your railroad does business with?

"A. Yes, sir.

"Q. Do you know whether or not they have filed applications with the Interstate Commerce Commission for any type of authority under the grandfather clause?

"A. I understand from what they told me that most of them have." (See also R. 124-125.)

146; *Moore v. United States*, 41 F. Supp. 786, 791 (D. Minn.), affirmed, *per curiam*, 316 U. S. 642³³. And since appellant assiduously sought to place control of, and responsibility for, these operations upon the contractors, it follows that under the Commission's general test they, rather than appellant, are the statutory "common carriers by motor vehicle." If otherwise qualified, the contractors, and not the appellant, are consequently entitled to receive the single certificate which the Commission is empowered to grant on the basis of the transportation service here involved.³⁴ *United States v. Rosenblum Truck Lines, Inc.*, 315 U. S. 50, 56. For the Commission to have granted appellant the certificate sought would have been to

³³ A determination upon evidentiary facts that one is or is not an independent contractor is ordinarily one for the trier of fact. *Vento v. Robinson*, 118 F. (2d) 679, 681-682 (C. C. A. 3).

³⁴ It is enough for present purposes to determine that the Commission was correct in denying the application of appellant, without considering whether the "grandfather" applications of the contractors with respect to these same operations should be granted. Merely because appellant was not entitled to a certificate with respect to these operations would not necessarily mean that the contractors were. Although they were, under the Commission's present decision, clearly performing service as "common carriers by motor vehicle", it would still be necessary for them to establish that they had continued such operations throughout the requisite "grandfather" period, and the present decision does not purport to settle their rights.

give it more³³ than is permitted under the rule of "substantial parity between future operations and prior *bona fide* operations" which the "grandfather clause" contemplates. *United States v. Carolina Freight Carriers Corporation*, 315 U. S. 475, 481; *Alton Railroad Co. v. United States*, 315 U. S. 15, 22.

The adequacy of the Commission's findings is challenged (Br. 67-69) by appellant. It is well settled that the Commission is not required to make formal and precise findings in the language which a court might employ, and is required to set forth only the basic and essential subordinate facts upon which its order rests. See, *e. g.*, *United States v. Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 464-465. With these principles in mind, it is obvious that the portion of the Commission's decision devoted to appellant's "grandfather" application (set forth in the Statement *supra*, pp. 8-10) contains an even more complete statement of the case than was required. It is urged that under the definition of "common carriers by motor vehicle" contained in Section 203 (a) (14) it was essential that the Commission make a finding that the contractors were undertaking to transport this freight for the general public. This contention

³³ The certificate would give appellant the right to serve the public with its own equipment and employees under its own control and responsibility. The Commission in fact specifically required that appellant so operate with respect to the new operations authorized in the certificates which were granted to it in these same proceedings (R. 21).

overlooks the fact, pointed out *supra*, pp. 25-26, that the Transportation Act of 1940, in effect at the time of the Commission's decision, substituted "holds * * * out to * * * engage in transportation" for "undertakes * * * to transport" as used in the definition of "common carriers by motor vehicle" in the Motor Carrier Act of 1935. See Appendix, *infra*, pp. 58, 59. And, as previously shown (*supra*, pp. 25-31), though these two phrases, so far as they relate to line-haul operations, mean the same thing, the Commission's ultimate finding that these operations were under the control and responsibility of the contractors is the complete and obvious equivalent of an ultimate finding that the contractors "held out", as that phrase has been construed by the Commission and the courts. The ultimate finding made was therefore sufficient under the rule that it is the substance rather than the form of findings which is controlling. *Quannah, A. & P. Ry. Co. v. United States*, 28 F. Supp. 916, 918 (N. D. Tex.), affirmed, *per curiam*, 308 U. S. 527.

III

THE COMMISSION WAS NOT REQUIRED TO CONSIDER ISSUES OF PUBLIC CONVENIENCE AND NECESSITY IN THE PRESENT "GRANDFATHER" CLAUSE PROCEEDINGS

Appellant urges (Br. 58-61) that the Commission, after having denied its "grandfather" clause claim, should have considered whether in

any event it was not entitled to a certificate on the ground that public convenience and necessity required the operations involved. The plain answer to this contention is that the Commission is not required to consider "grandfather" clause issues and public convenience and necessity issues in the same proceedings and has never adopted such a practice where a public convenience and necessity application has not been on file.

The Commission, pursuant to power granted to it by statute to prescribe its rules of procedure,³⁶

³⁶ Section 17 (3) of Part I of the Interstate Commerce Act (49 U. S. C. 17 (3)) provides:

"The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

* * * The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it. * * *

This provision is made applicable to proceedings under Part II of the Act by Section 205 (h) (49 U. S. C. 305 (h)). Moreover, Section 204 (a) (6) (49 U. S. C. 304 (a) (6)) provides that it shall be the duty of the Commission:

"To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedure for such administration; * * *

Furthermore, in Section 206 (b) (49 U. S. C. 306 (b)), it is provided that:

"Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. * * *

early in its administration of the Motor Carrier Act adopted one form of application for "grandfather" applications under Section 206 (a) and another for public convenience and necessity applications³⁷ under Section 207 (a). Appellant filed with the Commission only a "grandfather" application, upon which the case was heard. No public convenience and necessity application has ever been filed by appellant with respect to these operations. When appellant sought to introduce certain evidence³⁸ which related to public convenience and necessity rather than strictly to "grandfather" issues, protestants objected to broadening the issues and also advanced the ground of surprise, since the notice of hearing did not specify that anything but the "grandfather" claim was to be considered³⁹ (R. 55-57,

³⁷ The Commission on October 8, 1935, prescribed one form of application for use in "grandfather" applications, and on October 28, 1935, a different form for use in other cases. *Lon D. Fisher Common Carrier Application*, 17 M. C. C. 565; 567.

³⁸ This was merely certain general evidence that it was possible by using motor trucks to improve rail service and was described by appellant's counsel as "more or less informative" (R. 55).

³⁹ Appellant argues (Br. 61) that the notice (R. 145-147) was broad enough to include issues of public convenience and necessity because it stated:

"That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted."

But it is apparent from an examination of the whole notice and its reference only to the "grandfather" application (No.

71-74). This evidence was received by the examiner⁴⁰ with the understanding that it would be considered for whatever it tended to prove under the issues set down for hearing (R. 56, 72). Appellant's counsel stated that he was not going to foreclose himself from relying on such evidence as proof of public convenience and necessity if the Commission should adopt the rule that such issues must be considered in a "grandfather" case (R. 57). However, no further evidence on this issue was offered, and no findings as to public convenience and necessity were made by the Commission.

The refusal of the Commission to consider issues of public convenience and necessity in a "grandfather" proceeding was in keeping with its consistent practice illustrated by many cases.⁴¹

MC-42614) that this was merely a typical "grandfather" hearing notice. The quoted language meant no more than that if the evidence showed appellant was entitled to a "grandfather" permit as a contract carrier under Section 209, rather than to a "grandfather" certificate as a common carrier, the former type of authority would be granted.

⁴⁰The examiner's action in admitting the evidence did not bind the Commission to consider it, since an examiner is a mere subordinate officer, whose actions are not conclusive upon his superior administrative agency which alone has the responsibility of decision. See *Federal Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 285-286.

⁴¹*Lon D. Fisher Common Carrier Application*, 17 M. C. C. 565; *Tips Common Carrier Application*, 18 M. C. C. 85; *C. L. Wade Common Carrier Application*, 21 M. C. C. 305; *D. A. Beard Truck Lines Co. Common Carrier Application*, 21 M. C. C. 703; *A. E. McDonald Motor Freight Lines Common Carrier Application*, 22 M. C. C. 559; *Eaton Com-*

The Commission has refused to do this, not only when there was only a "grandfather" application before it, but also when both types of application were on file. The Commission's reasoning in this connection is best exemplified by its decision in *Lon D. Fisher Common Carrier Application*, 17 M. C. C. 565. There a petition was filed for reconsideration or rehearing in order that the issue of public convenience and necessity under Section 207 might be considered after a "grandfather" application had been denied, there being no public convenience and necessity application on file. The Commission, in denying the petition, said (17 M. C. C. 565, 568):

In that petition applicants contend that it is our duty, having denied the claim for "grandfather" rights, to proceed to a consideration of the question of public convenience and necessity upon the present application. In support of this position they urge that the second sentence of the

mon Carrier Application, 22 M. C. C. 791; *Julius H. Howitt Common Carrier Application*, 23 M. C. C. 271; *Martin Motor Lines, Inc., Common Carrier Application*, 23 M. C. C. 313. The Commission has admittedly, where convenient, sometimes consolidated for argument and decision both types of proceedings, as in *Kansas City S. Transport Co., Inc., Common Carrier Application*, 10 M. C. C. 221, and *Missouri Pacific Railroad Co. Common Carrier Application*, 22 M. C. C. 321, upon which appellant relies (Br. 58). There, unlike the situation here, the applicants also had on file public convenience and necessity applications.

first proviso of Section 206 (a)⁴² puts us under such a compulsion. We do not agree. That sentence of the "grandfather" clause refers only to those motor carriers who were entitled to "grandfather" rights but who failed to file applications therefor within the time prescribed by the statute. When a "grandfather" application has been filed and the issues presented therein have been determined, the application is *functus officio*. No further duty rests upon us to consider issues which were not and are not now presented to us by applicants. *United States v. Maher*, 307 U. S. 148. The "petitions for further proceedings" do not present these further issues in any such manner as to permit us properly, under our statutory powers, our orders, and our established procedure, to consider or determine them.

Not only did Congress ratify this construction in the Transportation Act of 1940,⁴³ but the courts

⁴² That Section, after providing for the issuance of "grandfather" certificates, provides in the second sentence mentioned, upon which appellant also relies (Br. 60):

"Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly." (49 U. S. Code 306 (a).)

⁴³ The failure of Congress there to amend the second sentence of the first proviso of Section 206 (a) after it had been thus construed, while amending that Section and the Act generally, is, we submit, the equivalent of ratification by express reenactment of language after it has been administratively construed. Cf. *N. Y., N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 401-402; *United States*

have uniformly upheld, as within its legitimate discretion, the Commission's refusal to weld these two types of proceedings together. This has been true not only where no claim was made by the applicant before the Commission that he was entitled to a certificate on grounds of public convenience and necessity,⁴⁴ but also where such request was made. And, in the latter situation, it has been true not only where there was no public convenience and necessity application on file,⁴⁵ but even where there was.⁴⁶

v. Dakota-Montana Oil Co., 288 U. S. 459, 466; *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115.

⁴⁴ *United States v. Maher*, 307 U. S. 148, 156, presented a case of this sort, and this Court said:

"But the District Court set aside the Commission's order on another ground. It held that when the Commission rejected appellee's claim under the 'grandfather clause' another provision of § 206 (a) sprang into relevance, to wit 'Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly.' We do not read the statute as laying a compulsion upon the Commission to canvass all the questions of public and private interest that are implicit in an application for a certificate based on 'public convenience and necessity' when the applicant himself only seeks the favor of the 'grandfather clause' and makes no claim, either before the Commission or in his bill seeking to enjoin its action, to have the Commission act outside the 'grandfather clause.'"

⁴⁵ *Philadelphia-Detroit Lines v. United States*, 31 F. Supp. 188, 190 (S. D. Fla.), affirmed, *per curiam*, 308 U. S. 528.

⁴⁶ *Los Angeles-Seattle Motor Express Inc. v. United States*, 39 F. Supp. 783 (W. D. Wash.); *Lubetich v. United States*, 39 F. Supp. 780, 782 (W. D. Wash.), affirmed, 315 U. S. 57; *A. E. McDonald Motor Freight Lines, Inc. v. United States*, 35 F. Supp. 132, 135 (N. D. Tex.).

The last-mentioned situation is certainly more compelling than the present one where appellant had never even filed a public convenience and necessity application. Here, there having been no public convenience and necessity application on file, the case of *Philadelphia-Detroit Lines v. United States*, 31 F. Supp. 188 (S. D. Fla.) is precisely in point. It was there held that under these circumstances it was a valid exercise of the Commission's discretion to deny a petition to permit factual proof of public convenience and necessity under the "grandfather" application. This Court affirmed that holding, *per curiam*, 308 U. S. 528. It is immaterial that the petition there was filed after the "grandfather" application had been denied, whereas here appellant asserted this contention at the original hearing on the "grandfather" application. The decision in the *Philadelphia-Detroit* case was not based upon the fact that the contention was not seasonably made, but upon the fact that no such issues were raised by the pleadings filed in the pending proceeding, viz, the "grandfather" application proceedings.

The conclusions reached in the foregoing judicial decisions are abundantly fortified by cogent reasons which may be adduced in support of the Commission's practice of considering separately the two types of proceeding. In the first place, the issues to be proved are distinct. In a "grandfather" application, the principal question is

usually one of historic fact. The applicant must prove the scope of his *bona fide* operations on and since June 1, 1935. If such proof is forthcoming, the application must be granted regardless of the public need for applicant's service. In a public convenience and necessity application, on the other hand, present or future need for the service is the primary consideration. Past performance is not controlling; entirely new operations may be instituted, or old operations extended, if such service is required by the public. In this type of hearing, there will generally be proof as to what existing service is available and what traffic may be anticipated to support the carriers in the field; many other similar considerations will be germane which are quite foreign to the issues in a "grandfather" proceeding. Logic dictates dealing with these widely disparate issues in separate proceedings.

Practical necessities of administration justify the same conclusion. This Court is cognizant of the magnitude of the Commission's task in passing upon some 90,000 "grandfather" applications. *Gregg Cartage & Storage Co. v. United States*, 316 U. S. 74, 84. It is readily apparent what delay and paralysis in the administration of Part II of the Interstate Commerce Act would result if the extensive issues and voluminous testimony incident to consideration of the question of public convenience and necessity had to be canvassed

before disposing of each of the "grandfather" applications.

No injustice or hardship results from pursuing the practice adopted by the Commission. Since the denial of the "grandfather" application was based solely on the ground that appellant was not a "common carrier by motor vehicle," and since a certificate is only required of such carriers, it follows that appellant is left free to continue doing business in the manner it now does without authorization from the Commission. *United States v. Rosenblum Truck Lines Inc.*, 315 U. S. 50, 56. If, on the other hand, it desires to operate as a "common carrier by motor vehicle," it is at liberty to make proper application for a certificate to do so on the basis of public convenience and necessity, and to have a full hearing on the separate issues raised by such application. In fact, as has been stated (fn. 1, *supra*, p. 3), several such applications with respect to other operations were filed by appellant and were granted by the Commission at the same time it denied the "grandfather" claim now in litigation (see 31 M. C. C. 299).

Consequently, it is submitted that the Commission's failure here to amalgamate "grandfather" and public convenience and necessity proceedings was in all respects proper, being just, reasonable, in accordance with its consistent practice, and within its statutory power.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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NOVEMBER 1943.

APPENDIX

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 17 (3) provides in part:

The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * * The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, * * * (49 U. S. C. 17 (3).)

Motor Carrier Act, August 9, 1935, c. 498, 49 Stat. 543. Section 203 (a) (14) provides:

The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I. (49 U. S. C. 303 (a) (14).)

Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 543, as amended.

Section 202 (c) provides:

Notwithstanding any provision of this section or of section 203, the provisions of this part shall not apply—

* * * * *

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I; an express company subject to part I, a motor carrier subject to this part, or a water carrier subject to part III, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental. (49 U. S. C. 302 (c) (2).)

Section 203 (a) (14) provides:

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I. (49 U. S. C. 303 (a) (14).)

Section 204 (a) (6) provides:

It shall be the duty of the Commission—

* * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; * * *
(49 U. S. C. 304 (a) (6).)

Section 205 (h) provides:

All the provisions of section 17 of part I shall apply to all proceedings under this part. (49 U. S. C. 305 (h).)

Section 206 (a) provides:

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to inter-

ruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful; *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part. (49 U. S. C. 306 (a).)

Section 206 (b) provides:

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission. (49 U. S. C. 306 (b).)

Section 207 (a) provides:

Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of

passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations. (49 U. S. C. 307 (a).)